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19 FAMILY TRUST

20
21 UNITED STATES DISTRICT COURT
22
23 DISTRICT OF NEVADA

24
25 DENNIS MONTGOMERY and the) Case No. 3:06-CV-00056-PMP-VPC
26 MONTGOMERY FAMILY TRUST,) BASE FILE
27 Plaintiffs,) (Consolidated with Case No. 3:06-CV-
28 vs.) 00145-PMP-VPC)
19 ETREPPID TECHNOLOGIES, LLC; WARREN) PLAINTIFFS' MOTION TO STRIKE:
20 TREPP; and the UNITED STATES) (1) ATTORNEY MICHAEL FLYNN'S
21 DEPARTMENT OF DEFENSE,) RESPONSE IN SUPPORT OF
22 Defendants.) GOVERNMENT'S MOTION TO
23 AND RELATED CASES.) COMPEL ENFORCEMENT OF
24) PROTECTIVE ORDERS, (2)
25) DECLARATION OF MICHAEL FLYNN
26) IN SUPPORT THEREOF, AND (3)
27) SUPPLEMENTAL DECLARATION OF
28) MICHAEL FLYNN

29
30 Plaintiffs Dennis Montgomery and the Montgomery Family Trust (the "Montgomery
31 Parties"), by and through their counsel of record, hereby submit their Motion to Strike: (1)
32 Attorney Michael Flynn's Response in Support of Government's Motion to Compel Enforcement
33 of Protective Orders; (2) Declaration of Michael Flynn in Response to Government Motion to

1 Compel Enforcement of Protective Orders; and (3) Supplemental Declaration of Michael Flynn in
 2 Response to Montgomery's Opposition to the Government's Motion to Compel Enforcement of
 3 Protective Orders. The Motion to Strike is supported by the following points and authorities.

4 **I. INTRODUCTION.**

5 Nothing in the Motion for Enforcement of U.S. Protective Order (the "Motion") by the
 6 United States (the "Government") called for any "response" to be filed by Michael Flynn
 7 ("Flynn"), prior counsel for plaintiffs the Montgomery Parties. Certainly nothing in the
 8 Government's Motion justified Flynn's submission of a brief, an initial declaration executed
 9 December 7, 2007 and a supplemental declaration executed January 4, 2008 (collectively, Flynn's
 10 "Response") that attacks the Montgomery Parties and their successor counsel personally, dismisses
 11 the Montgomery Parties' assertion of the attorney-client privilege and urges the Court to grant the
 12 Motion. Flynn no longer represents the Montgomery Parties. Obviously, he cannot purport to be
 13 presenting his assertions on behalf of any party to the litigation. Nor can Flynn credibly claim that
 14 the Government's Motion required him to file his Response in order to protect his personal
 15 interests. The Motion does not require Flynn to do anything other than allow the Government to
 16 review files in his possession *that belong to the Montgomery Parties*. In refusing to return those
 17 files based on a retaining lien, Flynn necessarily concedes that the files are the Montgomery
 18 Parties' property.

19 Under principles of standing, Flynn lacks any justification to submit a response to the
 20 Government's Motion—much less a response that attacks the Montgomery Parties and disputes
 21 their assertion of the attorney-client privilege—because the Government's proposals do not
 22 threaten to cause Flynn any harm. As Flynn has no stake in the outcome of the Motion, his
 23 Response should be stricken in its entirety.

24 Flynn's Response should be stricken for the independent reason that it is not pertinent to the
 25 merits of the Government's Motion. The Response essentially consists of ad hominem attacks on
 26 the Montgomery Parties and their successor counsel and arguments that have nothing to do with the
 27 Government's proposed document review procedures. Flynn files the Response essentially to vent
 28 his apparent rage over his fee dispute with the Montgomery Parties and to punish them by

1 supporting the Government's Motion. The Response is "impertinent" within the meaning of Rule
 2 12(f) of the Federal Rules of Civil Procedure and should be stricken for this separate reason.

3 **II. FLYNN'S RESPONSE IN SUPPORT OF THE GOVERNMENT'S MOTION**
 4 **SHOULD BE STRICKEN SINCE FLYNN DOES NOT REPRESENT ANY PARTY**
 5 **AND IS NOT PERSONALLY THREATENED WITH HARM BY THE**
 6 **GOVERNMENT'S PROPOSED REVIEW PROCEDURES.**

7 The doctrine of standing refers to a plaintiff's ability to invoke the jurisdiction of the court
 8 to decide "cases" or "controversies" within the meaning of Article III of the Constitution. *See*
 9 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The well-established test for standing is
 10 useful for determining whether Flynn's Response should be considered by the Court. If Flynn
 11 lacks a significant interest in the outcome of the Motion under the test for standing—which
 12 assesses the harm to the plaintiff caused by the conduct at issue—then the arguments and assertions
 13 he makes in his Response should be stricken.

14 To establish standing: (1) a plaintiff must have suffered an injury in fact; (2) there must be a
 15 causal connection between the injury and the conduct complained of; and (3) it must be likely that
 16 the injury complained of can be redressed by a favorable court decision. *See Cent. Delta Water*
 17 *Agency v. United States*, 306 F.3d 938, 946-947 (9th Cir. 2002). With respect to the first prong of
 18 the test, "[a]n injury in fact is an invasion of a legally protectable interest which is both 'concrete
 19 and particularized,' as well as 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 946-947
 20 quoting *Lujan, supra*, 504 U.S. at 560. Under the considerations pertinent to the test for standing,
 21 Flynn has no legal justification to take a position on the merits of the Government's Motion
 22 because it does not threaten to cause him any injury.

23 By its Motion, the Government wants this Court to establish various categories of
 24 information in the Montgomery Parties' files in Flynn's possession and then:

25 • have a Government employee or employees with the appropriate security clearances
 26 review the files to identify and segregate all documents that fall within three of the
 27 specified categories and redact purportedly protected information from those
 28 documents;

- 1 • return redacted copies of the documents to the Montgomery client files;
- 2 • store unredacted originals and one copy of the redacted documents with the U.S.
- 3 Department of Justice Security Office until 90 days after the final resolution of the
- 4 Montgomery Parties' fee dispute with Flynn; and
- 5 • upon completion of the 90-day period, destroy the unredacted originals and copies
- 6 unless directed by current and former counsel or ordered otherwise.

7 Government's Motion, pp. 3-5.

8 By asserting his right to withhold these files from the Montgomery Parties pursuant to a
 9 retaining lien, Flynn necessarily acknowledges that the files are the Montgomery Parties' property.
 10 As the court observed in *Morse v. Eighth Judicial Dist. Court*, 65 Nev. 275 (1948), a retaining lien
 11 "may be defined as the right of an attorney at law to retain possession of such documents, money,
 12 or *other property of his client coming into his hands by virtue of the professional relationship . . .*"
 13 *Id.* at 285 (emphasis added). Since Flynn does not own the files that the Government wants to
 14 review, the procedures that the Government seeks to implement by its Motion do not cause or
 15 threaten to cause Flynn any harm. Accordingly, under principles pertinent to standing, Flynn lacks
 16 any legal basis for taking any position regarding the Government's Motion, let alone a position that
 17 is opposed by the Montgomery Parties.

18 Notably, Flynn makes no effort to demonstrate that the Government's Motion threatens him
 19 with any injury that gives him grounds to present his Response. Flynn claims that he "is not certain
 20 how to accomplish" the redaction of electronic documents. *See Response of Attorney Flynn in*
 21 *Support of Government's Motion ("Flynn's Brief") at 3-4; Declaration of Michael Flynn in*
 22 *Response to Government Motion ("Initial Flynn Decl."), ¶ 5; and Supplemental Declaration of*
 23 *Michael Flynn in Response to Government Motion ("Supplemental Flynn Decl."), ¶ 7.* He further
 24 claims that it has been impossible for him to complete the redaction process ordered by the Court
 25 and certify his completion of that process due to being consumed by having to respond to the
 26 Montgomery Parties' efforts to recover their files. Brief at 5-6; Initial Flynn Decl., ¶ 4; and
 27 Supplemental Flynn Decl., ¶ 6. Finally, in direct contravention of the Montgomery Parties' rights,
 28

1 Flynn challenges the Montgomery Parties' assertion of the attorney-client privilege and/or claims
 2 that the privilege is trumped by the Government's competing interests. Brief at 6-9.

3 Not only are Montgomery's assertions legally without merit, they fail to establish that Flynn
 4 would suffer any injury if the Government's Motion were granted. The Motion does not direct that
 5 Flynn redact any electronic files or other documents or certify his completion of that process. In
 6 fact, contrary to Flynn's assertions, the Court's September 4, 2007 order permitting him to
 7 withdraw does not actually require that he redact information in his files. Rather, the Court ordered
 8 that Flynn and his co-counsel certify that they have "not transmitted any information covered by
 9 the military and state secrets privilege to new counsel for Dennis Montgomery . . ." See Court's
 10 September 4, 2007 Order. To the extent Flynn contends he cannot provide this certification
 11 without redacting information in his files, his remedy is to seek an appropriate limitation on the
 12 scope of the certification requirement in the September 4, 2007 order, not to file a Response that,
 13 contrary to the Montgomery Parties' interests, supports the Government's Motion.

14 Nor does the Motion give Flynn any grounds to challenge the Montgomery Parties' right to
 15 assert the attorney-client privilege. Only the Montgomery Parties can waive the privilege. See
 16 *Manley v. State*, 115 Nev. 114, 121 (1999) ("While the attorney may claim the privilege on the
 17 client's behalf, only the client has the ability to waive it."). See also Nev. Rev. Stat. Ann. § 49.095.

18 In sum, Flynn had no standing to file his Response to the Government's Motion as the
 19 Motion did not threaten to cause him any injury. Certainly he lacked any justification for
 20 presenting a response that is diametrically opposed to the interests of his former clients. Flynn's
 21 Response should be stricken in its entirety.

22 **III. FLYNN'S RESPONSE SHOULD BE STRICKEN SINCE IT IS IMPERTINENT.**

23 Rule 12(f) of the Federal Rules of Civil Procedure provides for a motion to strike from any
 24 pleading, "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P., Rule
 25 12(f). Impertinent matter consists of "statements that do not pertain, and are not necessary, to the
 26 issues in question." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir 1993) (quoting 5
 27 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706-07 (1990)),
 28 *rev'd on other grounds*, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). "[A] 'motion to

1 strike' materials that are not part of the pleadings may be regarded as an 'invitation' by the movant
 2 'to consider whether [proffered material] may properly be relied upon.'" *United States v. S. Cal.*
 3 *Edison Co.*, 300 F. Supp. 2d 964, 973 (D. Cal. 2004) quoting *United States v. Crisp*, 190 F.R.D.
 4 546, 551 (E.D. Cal. 1999), in turn, quoting *Monroe v. Board of Educ.*, 65 F.R.D. 641, 645 (D.
 5 Conn. 1975). “[A] motion to strike has sometimes been used to call to courts' attention questions
 6 about the admissibility of proffered material in similar circumstances.” *Monroe v. Board of*
 7 *Education*, 65 F.R.D. 641, 645 (D. Conn. 1975).

8 In essence, Flynn's Response consists of personal attacks against the Montgomery Parties
 9 and their current counsel and arguments that have no relevance to the Government's Motion. See,
 10 e.g., Brief, generally; Initial Flynn Decl. ¶¶ 3, through 7; and Supplemental Flynn Decl., ¶¶ 3
 11 through 10. Flynn's attacks and assertions do not pertain to and are not necessary to decide the
 12 Government's Motion. Ultimately, Flynn's assertions demonstrate that the real reason he supports
 13 the Government's Motion is to punish the Montgomery Parties for disputing his fees. The
 14 Response should be stricken as “impertinent” within the meaning of Rule 12(f).

15 **IV. CONCLUSION.**

16 For the foregoing reasons, Flynn's Response, (i.e., his brief and supporting December 7,
 17 2007 and January 4, 2008 declarations), should be stricken in its entirety.
 18

19 Dated: January 10, 2008

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22 By:



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 28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICES OF LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP, and that on the 10th day of January 2008, I caused to be served the within document described as **PLAINTIFFS' MOTION TO STRIKE: (1) ATTORNEY MICHAEL FLYNN'S RESPONSE IN SUPPORT OF GOVERNMENT'S MOTION TO COMPEL ENFORCEMENT OF PROTECTIVE ORDERS, (2) DECLARATION OF MICHAEL FLYNN IN SUPPORT THEREOF, AND (3) SUPPLEMENTAL DECLARATION OF MICHAEL FLYNN** on the interested parties in this action as stated below:

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[ELECTRONIC] By filing the document(s) electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document(s) to the persons listed above at their respective email address.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on 1/10/2008, at Los Angeles, California.



CYNTHIA KENNEDY

PROOF OF SERVICE